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No. 75-1141

In the Supreme Court of the United States

OCTOBER TERM, 1975

WILLIAM M. REESE, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

Neither the *per curiam* opinion of the court of appeals (Pet. App. A 26) nor the order of the district court (Pet. App. A 25) is reported.

JURISDICTION

The judgment of the court of appeals was entered on December 10, 1975. A petition for rehearing was denied on January 12, 1976 (Pet. App. A 27). The petition for a writ of certiorari was filed on February 11, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the district court properly denied petitioner's pre-sentence motion to withdraw his plea of *nolo contendere*.

STATEMENT

An information filed on May 3, 1974, in the United States District Court for the Northern District of Texas charged petitioner with two counts of criminal contempt, in violation of 18 U.S.C. 401. Petitioner was accused of willfully disobeying a court order permanently enjoining him from violating the registration provisions of the Securities Act of 1933, 15 U.S.C. 77e(a) and 77e(c), and the anti-fraud provision of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and 17 C.F.R. 240.10b-5, in connection with the offer and sale of the common stock of the Industrial Instrument Corporation or of any other securities.[1] Approximately one year later, after petitioner had obtained repeated postponements of his trial, he entered a plea of *nolo contendere*, which the district court accepted. On the following day, however, petitioner moved to withdraw his plea. After a hearing, the court denied that motion (Pet. App. A 25). On June 13, 1975, prior to sentencing, petitioner again moved to withdraw his plea. After a second hearing, the court again denied the motion. Petitioner was fined $1,000 and sentenced to two years' imprisonment, all but six months of which were suspended. The court of appeals affirmed (Pet. App. A 26).

1. At petitioner's arraignment on June 7, 1974, his retained counsel informed the court that petitioner might

[1]The information charged petitioner with renewed violations of these provisions of the federal securities laws in connection with the offer and sale of the common stock of American Southwest Development Corporation. These acts and practices had previously been the basis for a civil injunctive action filed by the Securities and Exchange Commission on May 22, 1973. *Securities and Exchange Commission* v. *American Southwest Development Corporation, et al.*, N.D. Tex., No. CA 3-7226-C. Without admitting or denying the allegations in the Commission's complaint in that action, petitioner had consented to the entry of an order permanently enjoining him for the second time from violating the federal securities laws.

be willing to enter a plea of guilty if a satisfactory understanding could be reached with the government (Transcript of June 7, 1974, pp. 4-6). The court then recessed the arraignment to permit counsel "to complete [his] negotiations" (*id.* at 7). At a second arraignment on July 22, 1974, counsel informed the court that after careful examination of the information, petitioner had decided to plead *nolo contendere*, since he "did not wish to burden this Court with a trial on a plea of not guilty" (Transcript of July 22, 1974, p. 3). However, petitioner asked to confer with his attorney in private. After a short recess, counsel informed the court that an "irreconcilable [difference of] opinion has come up between me and [petitioner]" and asked to be permitted to withdraw from the case (*id.* at 5). The court duly recessed the proceedings to allow petitioner to obtain new counsel.

At his arraignment on November 13, 1974, petitioner pleaded not guilty.[2] Although the trial was scheduled to begin the following week, petitioner's counsel requested and was granted a continuance in order to inspect documentary evidence in the government's possession (Transcript of November 13, 1974, pp. 4-8). When the case was called on January 30, 1975, petitioner was represented by a third set of attorneys. Upon petitioner's assurance that he wished the new attorneys to represent him, the court permitted his former attorneys to withdraw their representation. The trial was then scheduled for the following Monday.

[2]At the first arraignment hearing, petitioner was informed that he had been charged with a "petty offense" carrying a maximum penalty of 6 months' imprisonment and a $500 fine on each count. Subsequently, a new information was filed which charged petitioner with a "serious offense". At his arraignment, petitioner acknowledged that he understood that he could receive a sentence of up to ten years' imprisonment on these charges (Transcript of November, 13, 1974, pp. 2-3).

On that day, however, petitioner requested a further postponement of the trial on the ground of irreconcilable differences with his most recent counsel concerning the proper method of conducting his defense (Transcript of February 3, 1975, p. 14). Petitioner claimed that his second attorney had brought his present counsel into the case without his consent. He insisted that he wanted counsel of his own choosing and promised to move expeditiously to obtain representation if the trial were postponed (*id.* at 4-5, 13). Although stating that it was exasperated with petitioner's "game playing with the Court" (*id.* at 17), the district court nonetheless granted the continuance and set the case for trial in approximately two months. The government had to excuse its witnesses, who had been brought to Texas from Kansas, New York, and Washington, D.C. (*id.* at 19).

Petitioner subsequently retained a fourth attorney and obtained a further postponement of the trial to allow adequate preparation of his defense.

2. On the morning of the ultimate trial date, May 5, 1975, a jury panel and the government witnesses were again assembled in the courtroom. Petitioner's attorney informed the court that petitioner wished to plead *nolo contendere*, provided that he was "given a probated sentence" (Transcript of May 9, 1975, p. 30). The prosecutor warned counsel that "there would be no promise or recommendation of probation" (*id.* at 23). The court similarly stated that it "could make no [such] agreement" and instructed counsel to discuss the matter with petitioner (*id.* at 54-55).

When court reconvened that afternoon, counsel stated that petitioner desired "to change his plea to *nolo contendere* on Count One * * * [upon] the government's agreement to dismiss Count Two" (Transcript of May 5, 1975, p. 3). Pursuant to Rule 11, Fed. R. Crim. P., the court

asked petitioner whether he understood the charges against him; whether he appreciated that the court would find him guilty upon a plea of *nolo contendere* and that the court alone would fix punishment; whether he was entering the plea freely and voluntarily; and whether the government had threatened him or promised him anything except dismissal of the second charge (*id.* at 7-9). Petitioner responded appropriately to each question. At the government's request, petitioner was sworn as a witness and was asked essentially the same questions, to which he gave similar responses (*id.* at 11-12). The court thereupon accepted his plea and deferred sentencing (*id.* at 12-15).

On the following day, prior to the imposition of sentence, petitioner moved to withdraw his plea under Rule 32(d), Fed. R. Crim. P. The district court denied that motion, and the court of appeals affirmed.

ARGUMENT

Petitioner contends (Pet. 5) that the district court erred in denying his pre-sentence motion to withdraw his plea of *nolo contendere*. He argues (Pet. 9, 12, 20) that his plea was not knowingly and voluntarily entered due to the cumulative effect of his financial, physical, and emotional problems at that time.

Although a pre-sentence motion to withdraw a plea of guilty or *nolo contendere* should be granted "if for any reason the granting of the privilege seems fair and just", *Kercheval* v. *United States*, 274 U.S. 220, 224, such motions are addressed to the sound discretion of the trial court, and its determination is reversible only upon a showing of abuse of discretion. *E.g.*, *United States* v. *Presley*, 478 F. 2d 163, 166 (C.A. 5); *United States* v. *Vallejo*, 476 F. 2d 667, 669 (C.A. 3); *United States* v. *Lombardozzi*, 436 F. 2d 878, 881 (C.A. 2), certiorari denied, 402 U.S. 908.

In the instant case, the trial judge (who had presided over this case from the beginning) twice conducted hearings on petitioner's motion and rejected his claim that his plea had been entered involuntarily. The court concluded that the motion to withdraw the plea was nothing more than the latest in a labyrinthine series of efforts by petitioner "to avoid the moment of truth" (Transcript of June 13, 1975, p. 21). This conclusion, in which the court of appeals implicitly concurred, is amply supported by the record and does not warrant further review by this Court.

a. At the hearing on his motion, petitioner asserted that he had not had "a clear mind" and was "at the point of collapse" at the time he entered his plea (Transcript of May 9, 1975, pp. 8-9). But the probation officer who interviewed petitioner immediately after he entered the plea testified that petitioner had appeared "rational and * * * lucid" and had stated specifically that he was not under a physician's care or taking any medication at that time (*id.* at 70) . The trial judge, who had examined petitioner in detail at the time of his plea, also found that petitioner had been "perfectly clear and lucid [,] and I was convinced that you understood and knew everything I was saying and that the lawyers [said] * * * " (*id.* at 58, 92).[3]

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[3]For instance, the court engaged petitioner in the following colloquy (Transcript of May 5, 1975, pp. 11-12):

THE COURT: Has anyone forced you in any way to make this plea?

THE DEFENDANT: No sir, they have not.

THE COURT: Has anyone offered you any favor, or any reward?

THE DEFENDANT: No, sir.

THE COURT: You have done it solely—or freely and voluntarily?

THE DEFENDANT: Absolutely.

THE COURT: And do wish to proceed on that basis?

THE DEFENDANT: Yes, sir.

Moreover, in denying petitioner's motion, the district court properly considered the chain of events prior to the entry of the *nolo contendere* plea. Those proceedings refute any suggestion that petitioner entered his plea without a complete understanding of its consequences and fully justify the court's conclusion that, in seeking to withdraw his plea, petitioner was merely continuing his efforts to delay resolution of his case. Nearly eleven months had elapsed by then between petitioner's initial arraignment hearing and his change of plea on the ultimate day set for trial. During that period, petitioner had retained four sets of attorneys and had obtained numerous continuances to enable successive counsel to analyze his position. While petitioner may have disagreed with his attorneys over the proper manner of asserting his defenses, that fact itself strongly indicates that his decision to plead *nolo contendere* was well-considered and intelligently made. See *United States* v. *Komitor,* 392 F. 2d 520, 521 (C.A. 2). The courts below therefore properly rejected petitioner's attempt further to retard the disposition of this litigation by withdrawing his plea.

b. That petitioner now contends that he is innocent of the charges underlying the information (Pet. 7) is not dispositive of whether the district court abused its discretion in refusing to allow the withdrawal of his plea. See *Kercheval* v. *United States, supra,* 274 U.S. at 224. While such an assertion is an important factor to be considered by the court in passing upon a Rule 32(d) motion, "[w]ere mere assertion of legal innocence always a sufficient condition for withdrawal, withdrawal would effectively be an automatic right." *United States* v. *Barker,* 514 F. 2d 208, 220-221 (C.A. D.C.), certiorari denied, 421 U.S. 1013. Except for petitioner's claims regarding his "mental and physical condition", which were rejected by the district court, he suggests nothing to indicate that his

decision to enter the plea did not take into account those defenses he now asserts. Correspondingly, it is no argument at this stage to allege (Pet. 10-11) that evidence against petitioner was illegally obtained. Petitioner was convicted not upon evidence presented against him but upon his voluntary plea of *nolo contendere*. See *Tollett* v. *Henderson*, 411 U.S. 258, 267; *United States* v. *Ptomey*, 366 F. 2d 759, 760 (C.A. 3).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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